IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

ARBITRATION PETITION NO.100 OF 2007

Ashok Assandas Bahirwani — Petitioner
vs.
M/s.Kotak Mahindra Primus Limited. — Respondents

Mr.F.A.Mulla along with Mr.S.M.Kamble for the petitioner.

Ms.Nipa Singh i/b.M/s.Mahesh Menon & Co. for the respondents.

CORAM : ANOOP V. MOHTA,J.

DATED : 5th April, 2007

P.C.

The petitioner is the original respondent to a claim filed by the claimant-respondent before the Arbitrator as constituted under the agreement between the parties.

2. After hearing both the parties and considering the averments and findings given by the learned Arbitral Tribunal in paragraphs 4, 5, 6 and 10 which are reproduced below, I am of the view that the submission as raised by the learned counsel for the petitioner about the principle of natural justice has no substance. The Tribunal has rightly considered the matter and pass the order in question.

"4. Accordingly, respondent appear in the proceeding on

the first date of hearing and submitted an application for furnishing him copies of the documents. The matter came to be adjourned to 7.12.2005. On 7.12.2005, respondent remained absent and as per his request on telephone matter came to be adjourned to next date i.e. 26.12.2005. On 26.12.2005, also respondent remained absent the submission was made on behalf of claimant by Mis.Brahmi, that the copies of documents had been already supplied to the respondent. The matter then came to be adjourned to next date i.e. on 11.1.2006. The office of Arbitrator was closed on 11.1.2006 on account of public holiday i.e. "Bakri Id", hence the matter was taken up on the board on next date i.e. on 12.1.2006. The direction was given to the claimant to intimate next date of hearing to the respondent and the matter came to be adjourned to 23.1.2006 and thereupon to 6.2.2006.

5. It is further matter of record that since respondent remained absent on those dates, in the interest of justice in order to give one more opportunity to the respondent to appear in the proceeding and challenge the claim on 6.2.2006, final notice was ordered to be issued and matter came to be adjourned to next date i.e. on 22.2.2006, and thereupon 8.3.2006. On 22.2.2006 respondent remained absent. On 8.3.2006, respondent remained present in the proceeding and prayed for

adjournment on the ground that his Advocate was held up in High Court and as such cannot attend the proceeding. Though the matter was kept for final hearing as the compilation of document were already filed, in the interest of justice to give one more opportunity to the respondent, it was adjourned to next date with order of payment of cost of Rs.250/- to be paid to the claimant. On the next date i.e. 17.3.2006, respondent remained absent so also his Advocate. However, in the interest of justice without proceeding further in the matter it was adjourned to next date i.e. on 20.3.2006. On 20.3.2006, respondent remained present along with Advocate Shri Sudesh Gavahre, however, no statement of defence filed and adjournment was sought for as a last chance for filing defence statement. On the next date i.e. on 27.3.2006, respondent remained present alongwith Advocate Shri Rajput, who submitted that respondent wish to settle the matter and they desire to have joint meeting to explore the possibility of settlement. It was categorically submitted on behalf of respondent that on the next date he would file statement of defence if not settlement is worked out. At his request then matter came to be adjourned to next date i.e. 3.4.2006, on that date respondent was present and again he requested for adjournment for filing defence statement. In the interest of justice to give final chance to the respondent to file defence statement

matter came to be adjourned to next date i.e. 10.4.2006, subject to cost of Rs.500/-, which respondent agreed to pay on the next date. On 10.4.2006, respondent remained absent so also his Advocate. No statement of defence came to be filed by respondent. Since inspite of sufficient opportunity granted to respondent to file defence statement, he failed and neglected to do so I, proceeded further in the matter without statement of defence and matter came to be adjourned to next date for further hearing. On next date i.e. 17.4.2006, respondent remained absent though directed earlier, he did not pay the cost of Rs.500/- to the claimant.

6. As pointed out, earlier matter was adjourned from time to time at the request of respondent however, respondent did not file statement o defence challenging the claim and thereupon he has chosen to remain absent in the proceeding. Proceeding further in the matter I, heard Mis.Brahmi, for claimant and perused the documents filed in support of the claim. No argument came to be advanced nor any documentary evidence produce by the respondent as none present for respondent.

10. As pointed out above respondent did not file the defence statement challenging the claim, the above referred documents produced by the claimant have gone

unchallenged. These documents sufficiently established the fact regarding giving every opportunity to the respondent to make the payment of the said amount due and payable to the claimant. However, respondent did not comply with the requisitions thereof. Here, in the proceeding also an adjournment was taken by the respondent for the settlement. Repeatedly dates were taken for filing defence statement. However, neither the matter was settled nor the statement of defence came to be filed by the respondent and thereupon he had chosen not to remain present in the proceeding. It clearly goes to show that the respondent has committed breach of the terms of the said agreement by committing default in making the payment and inspite of sufficient opportunity given to him, he failed and neglected to pay the legal dues to the claimant. Under the said Agreement, the claimant is fully justified in selling the said vehicle and claiming short fall amount due and payable. The documentary evidence adduced by the claimant, referred to above, fully supports its claim. As pointed out above, the entire claim and the documentary evidence adduced in support of it, have gone unchallenged. In view of unchallenged, clear and conclusive evidence adduced by the claimant, its claim deserves to be accepted."

3. In so far as limitation is concerned, as referred to in para 3 of the Award, the claimant has referred the matter for an adjudication by letter dated 3.10.2005 and on giving consent dated 10.10.2005 necessary directions were issued on the same date and the matter was fixed on 11.11.2005. The statement of claim which is a part of this petition reflects date 14.10.2005. The receipt of the notice by the petitioner-respondent cannot be treated as a date of filing of the claim petition. From the date of the cause of action, the present claim as filed is within limitation.

4. The submission in reference to clause 14.1 of the agreement about notice is not tenable, firstly for the reasons that the petitioner did not appear before the Tribunal and never raised this issues earlier. Secondly considering the nature of transaction between the parties and being hire-purchase agreement, it is natural that the cause of action in such matters normally arises after the particular defaults. Admittedly, the petitioner has committed various defaults in the matter of payment though agreed. The notice as contemplated and as submitted, now at this stage, cannot be the ground to interfere with the award.

5. Though the petitioner was not present yet the Arbitrator should have given opportunity to

cross-examine the respondent; as contented cannot be accepted, now at this stage. Admittedly, the petitioner was absent throughout. No document was objected. The award is based on documentary evidence produced by the respondent. Apart from this in view of the fact that there is no dispute in so far as the agreement between the parties and the clauses referred therein, in my view, this is also a point which goes in support of the award and cannot be allowed to agitate for the first time in this petition.

6. However, the interest at the rate of 18% as awarded, in the facts and circumstancs of the case, is on higher side. It is reduced to 9% in view of the Apex Court decision in **Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy & Anr., 2007 AIR SCW 527.**

7. Taking all this into account, though opportunity was given to the petitioner to settle the matter yet he was unable to explore the same, in my view, therefore, there is no option but to confirm the award except the rate of interest be substituted at 9% instead of 18%, as passed.

8. The petition, therefore, is disposed of accordingly.

[ANOOP V. MOHTA,J.]